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R. *v.* Buhay, [2003] 1 S.C.R. 631, 2003 SCC 30

Mervyn Allen Buhay *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Quebec *Intervener*

Indexed as: R. *v.* Buhay

Neutral citation: 2003 SCC 30.

File No.: 28667.

2002: November 1; 2003: June 5.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for manitoba

Criminal law — Evidence — Admissibility — Marijuana seized from rented locker — Whether accused's constitutional right to be secure against unreasonable search or seizure violated — If so, whether evidence should be excluded — Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

Constitutional law — Charter of Rights — Unreasonable search and seizure — Application of Charter — Exclusion of evidence — Marijuana seized from rented locker — Whether accused had reasonable expectation of privacy in locker — Whether Charter applies to initial search by private security guards — Whether subsequent warrantless search and seizure by police violated accused's right to be secure against unreasonable search or seizure — If so, whether evidence should be excluded — Canadian Charter of Rights and Freedoms, ss. 8, 24(2), 32.

The accused rented a locker at the Winnipeg bus depot. A short time later, one of the security guards detected a strong odour of marijuana coming from the locker. The locker was opened by a Greyhound agent for the security guards, and inside they found a duffel bag containing some marijuana. The security guards placed the items back in the locker, locked it, and contacted the police. The police officers smelled marijuana and a Greyhound agent opened the locker for them. One of the officers seized the bag of marijuana, and placed it in the cruiser. The police officers did not have a search warrant. One of the officers testified that the idea of obtaining a warrant did not cross his mind. The other officer mentioned that he considered obtaining a warrant, but did not think the accused had a reasonable expectation of privacy in the locker and that, further, he did not think he had sufficient grounds to obtain a warrant. The next day, an individual tried to retrieve the bag from the locker, and the accused was later arrested and charged with possession of marijuana for the purpose of trafficking. The trial judge, finding a violation of s. 8 of the *Canadian Charter of Rights and Freedoms*, granted the motion to exclude the evidence under s. 24(2) of the *Charter*, and acquitted the accused. The Court of Appeal allowed the Crown's appeal and entered a conviction.

Held: The appeal should be allowed and the acquittal entered at trial restored.

The accused had a reasonable expectation of privacy in the contents of the locker he rented. The accused had control and possession of the locker's contents through possession of the key. Moreover, the signs on the lockers made no mention of the possibility that they might be opened and searched. A reasonable person would expect that his or her private belongings, when secured in a locker that he or she has paid money to rent, will be left alone, unless the contents appear to pose a threat to the security of the bus depot. The existence of a master key does not in itself destroy the expectation of privacy. While it was not as high as the privacy afforded to one's own body, home or office, a reasonable expectation of privacy existed in the locker sufficient to engage the accused's s. 8 *Charter* rights.

The initial search by the security guards did not trigger the application of the *Charter* because the guards were not acting as agents of the state, nor could their activities be assimilated or ascribed to the government. However, the police were required to obtain a warrant to search the accused's locker. The warrantless search and seizure was an impermissible intrusion of the state on a legitimate and reasonable expectation of privacy and therefore constitutes a violation of s. 8 of the *Charter*. The Court of Appeal erred in finding that there was no search and seizure by the police. A person's reasonable expectation of privacy as to the contents of a rented and locked bus depot locker is not destroyed merely because a private individual invades that privacy by investigating the contents of the locker. The accused's reasonable expectation of privacy was continuous. The intervention of the security guards does not relieve the police from the requirement of prior judicial authorization before seizing contraband uncovered by security guards.

This Court should not interfere with the trial judge's decision to exclude the evidence under s. 24(2) of the *Charter*. On the issue of trial fairness, the evidence in this case is non-conscriptive, "discoverable" evidence, and its admission would not render the trial unfair. On the question of the seriousness of the breach, the trial judge is entitled to considerable deference. The fact that obtaining a warrant did not even cross the mind of one officer demonstrates a certain casual attitude toward the accused's *Charter* rights. The other officer's admission that he did consider obtaining a warrant but that he thought that he lacked sufficient grounds to get one also suggests blatant disregard for the accused's rights. Moreover, there was no situation of urgency or necessity, as there was no immediate danger that the evidence would be lost, removed or destroyed, nor was an imminent threat posed by the marijuana in the locker. The situation did not require immediate action to secure the evidence, as the locking mechanism was still engaged and the 24-hour limit had not expired. It is also clear from the record that the police could have obtained the evidence without infringing the accused's rights. The failure of the police officers to explore other investigative techniques that were available to them shows the absence of sincere effort to comply with the *Charter*. While some other elements militate in favour of the admission of the evidence, the evidence considered as a whole supports a conclusion that the violation was serious. The trial judge's assessment of the seriousness of the interference with the accused's privacy interests reveals no misapprehension of the evidence, or failure to consider relevant factors, and is not unreasonable.

The administration of justice does not have to be brought into disrepute on a national scale before courts may interfere to protect the integrity of the process within which they operate. While s. 24 (2) is not an automatic exclusionary rule, neither should it become an automatic inclusionary rule when the evidence is non-conscriptive and essential to the Crown's case. An appellate court must determine if, all factors considered, the trial judge's conclusion to exclude the evidence, based on her or his finding that its admission would bring the administration of justice into disrepute, was reasonable. In light of the trial judge's concern as to the long-term effect of the law enforcement officers' attitude in this case, it was well within his judicial discretionary power to conclude that the admission of the marijuana in this case would cause greater disrepute to the justice system than its exclusion would, and such decision is very well within the limits of reasonableness.

Cases Cited

Referred to: *R. v. Fitch* (1994), 47 B.C.A.C. 154; *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Edwards*, [1996] 1 S.C.R. 128; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Wong*, [1990] 3 S.C.R. 36; *R. v. Dinh* (2001), 42 C.R. (5th) 318, 2001 ABPC 48; *R. v. Mercer* (1992), 70 C.C.C. (3d) 180; *R. v. Law*, [2002] 1 S.C.R. 227, 2002 SCC 10; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *R. v. Broyles*, [1991] 3 S.C.R. 595; *R. v. Caucci* (1995), 43 C.R. (4th) 403; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *R. v. Dyment*, [1988] 2 S.C.R. 417; *R. v. Colarusso*, [1994] 1 S.C.R. 20; *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. Kokesch*, [1990] 3 S.C.R. 3; *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *R. v. Spindloe* (2001), 154 C.C.C. (3d) 8; *R. v. Belliveau* (1986), 75 N.B.R. (2d) 18; *R. v. Nielsen* (1988), 43 C.C.C. (3d) 548; *R. v. Kouyas* (1994), 136 N.S.R. (2d) 195, aff'd [1996] 1 S.C.R. 70; *R. v. Fitt* (1995), 96 C.C.C. (3d) 341, aff'd [1996] 1 S.C.R. 70; *Texas v. Brown*, 460 U.S. 730 (1983); *Rothman v. The Queen*, [1981] 1 S.C.R. 640; *R. v. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38; *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Therens*, [1985] 1 S.C.R. 613; *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717; *R. v. Duguay*, [1989] 1 S.C.R. 93; *R. v. Greffe*, [1990] 1 S.C.R. 755; *R. v. Mellenthin*, [1992] 3 S.C.R. 615; *R. v. Wise*, [1992] 1 S.C.R. 527; *R. v. Goncalves*, [1993] 2 S.C.R. 3; *R. v. Belnavis*, [1997] 3 S.C.R. 341; *R. v. Stillman*, [1997] 1 S.C.R. 607; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *R. v. Evans*, [1996] 1 S.C.R. 8; *R. v. Silveira*, [1995] 2 S.C.R. 297; *R. v. Caslake*, [1998] 1 S.C.R. 51; *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26; *R. v. Strachan*, [1988] 2 S.C.R. 980; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Sieben*, [1987] 1 S.C.R. 295; *R. v. Jacoy*, [1988] 2 S.C.R. 548; *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Burlingham*, [1995] 2 S.C.R. 206; *R. v. Simmons*, [1988] 2 S.C.R. 495; *R. v. Kitaitchik* (2002), 161 O.A.C. 169.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 24(2), 32(1).

Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 5(2).

Private Investigators and Security Guards Act, R.S.M. 1987, c. P132, ss. 1 "security guard", 35.

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APPEAL from a judgment of the Manitoba Court of Appeal (2001), 156 Man. R. (2d) 111, 84 C.R.R. (2d) 366, 246 W.A.C. 111, [2001] M.J. No. 215 (QL), 2001 MBCA 70, setting aside a decision of the Provincial Court (2000), 147 Man. R. (2d) 149, [2000] M.J. No. 571 (QL). Appeal allowed.

Bruce F. Bonney and *G. Bruce Gammon*, for the appellant.

David G. Frayer, Q.C., and *Erin E. Magas*, for the respondent.

Written submissions only by *Carole Lebeuf*, for the intervener.

The judgment of the Court was delivered by

1 ARBOUR J. — We are asked in this appeal to determine the constitutionality of a seizure of marijuana made from a locker the appellant had rented at the Winnipeg bus depot. This involves the determination of whether the *Canadian Charter of Rights and Freedoms* applies to an initial search conducted by private security guards. It also involves the determination of whether the subsequent warrantless search and seizure by the police violated the appellant's rights under s. 8 of the *Charter* and if so, whether the evidence should be excluded under s. 24(2) of the *Charter*.

I. The Facts

2 The Winnipeg bus depot has a set of lockers that can be rented out by the public. The lockers can be accessed by a key. The fee for a locker is $2 for any period of 24 hours or less, with a $4 overtime charge for an additional 24 hours. After the period expires, the contents of the locker may be removed and held for 30 days, after which they can be sold for accrued charges. A sticker on each locker explains these terms and conditions. The lockers are owned by Canadian Locker Company and are managed on an alternating basis by Greyhound Bus Lines and Grey Goose Bus Lines.

3 On March 14, 1998, two individuals approached the security desk at the Winnipeg bus depot to inquire about the use of lockers there. While one of the individuals spoke to the security guards, the other went to the bank of lockers and removed a bag from locker 135. He was noticed digging through the bag, and one of the security guards noted a slight odour of marijuana. The second man was pacing in front of the security guards and was glancing around. The two individuals were then seen locking the locker and walking out of the bus depot.

4 Approximately one hour and 45 minutes later, after completing other duties, the security guards decided to investigate further. They went to the locker. One of the guards, Mr. Mah, sniffed the vent of the locker door and smelled a strong odour of marijuana. The security guards went to the Cargo Express Agent for Greyhound Bus Lines, Mr. Will, and advised him of what they suspected was in the locker and inquired whether they could gain access. Mr. Will opened the locker with his master key. One of the security guards removed the duffel bag that they had seen being placed in the locker earlier and opened it. Inside, they found a sleeping bag with a quantity of marijuana rolled up in the middle. Following this discovery, the security guards placed the items back in the locker, locked it, and contacted the Winnipeg Police Service.

5 A short time later, Constables Barker and Riddell attended the bus depot and were directed by the security guards to locker 135. The officers smelled marijuana and the Greyhound agent opened the locker for them. Constable Barker seized the bag of marijuana and placed it in the back of his cruiser.

6 The police officers did not have a search warrant. Constable Barker testified that the idea of obtaining a warrant never crossed his mind and Constable Riddell mentioned that he did consider obtaining a warrant but that he did not think the appellant had a reasonable expectation of privacy in the locker and that, further, he did not think he had sufficient grounds to obtain a warrant.

7 Following the seizure of the drugs from the locker, the officers placed a note inside the locker with the pager number of an undercover vice officer. They instructed the security guards at the bus terminal to keep an eye on the locker. The next day, an individual attended at locker 135, opened it with a key, and upon reading the note, left the premises. The appellant was arrested later that afternoon.

8 At the time of these events, Greyhound Bus Lines was responsible for the lockers. Mr. Will testified that the company's policy was to enter a locker if it believed that the locker contained something dangerous or if it was "giving off a bad odour or something like that". No notice of this policy was given to those who rented the lockers.

II. Judgments Below

A. *Provincial Court of Manitoba* (2000), 147 Man. R. (2d) 149

9 The appellant was charged with possession of marijuana for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. At trial before Aquila Prov. Ct. J., a *voir dire* was held to determine the admissibility of the marijuana that was seized from the bus depot locker.

10 The trial judge first determined whether the *Charter* applied to the security guards. He held that it was clear from the evidence that the security guards were employed by a private security firm and that in order for the *Charter* to apply, they must be found to have been acting as agents of the state. Considering the decisions of the British Columbia Court of Appeal in *R. v. Fitch* (1994), 47 B.C.A.C. 154, and of this Court in *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, he concluded that the security guards were not agents of the state and that the *Charter* therefore did not apply to the initial search by them.

11 Aquila Prov. Ct. J. then examined the search and seizure by the police officers. As the search was warrantless, it was *prima facie* unreasonable. In accordance with the test set out in *R. v. Collins*, [1987] 1 S.C.R. 265, it could only be found reasonable if: (1) it was authorized by law, (2) the law itself was reasonable, and (3) the manner in which the search was carried out was reasonable. Aquila Prov. Ct. J. found that there were no "exigent circumstances" in the present case, and that the police officers could have easily obtained a search warrant.

12 Aquila Prov. Ct. J. then considered whether the appellant had a reasonable expectation of privacy with respect to the locker. He followed the test set out by Cory J. in *R. v. Edwards*, [1996] 1 S.C.R. 128, and concluded that the appellant had a personal and reasonable expectation of privacy. In particular, the appellant had a contract for exclusive use of the locker for 24 hours, which had not expired. Unless the locker contained something dangerous or was giving off an obnoxious smell, neither the managers nor the police had a right to enter. Consequently, the seizure by police violated s. 8 of the *Charter*.

13 To determine whether the evidence should be excluded, Aquila Prov. Ct. J. followed the test established in *Collins*. He found that the evidence was real and non-conscriptive. However, he concluded that the violation was serious and not merely technical. The trial judge expressed concern at the casual approach that the police took in infringing the appellant's rights. He felt that exclusion was

necessary to discourage similar police conduct in the future. Aquila Prov. Ct. J. granted the motion to exclude the evidence, and, as the parties agreed that the outcome of the case rested entirely on the admissibility of the drugs, the appellant was acquitted.

B. *Court of Appeal of Manitoba* (2001), 156 Man. R. (2d) 111, 2001 MBCA 70

14 In a brief judgment, Huband J.A. for the Manitoba Court of Appeal allowed the Crown's appeal and entered a conviction. The Court of Appeal was satisfied that the initial search by the security guards did not violate s. 8 because they were privately employed and, therefore, were not subject to the *Charter*. The court found that when the police opened the locker and seized the marijuana, there was merely a "transfer of control" from the security guards to the police. The court reasoned that had the security guards placed the marijuana into a corner cupboard or into a different locker, there would have been no question that the transfer of the marijuana would not have constituted a search and seizure by the police. Placing the marijuana back into the same locker on a temporary basis, but still under the control of the security guards, leads to the same conclusion. As there was no search or seizure conducted by agents of the state, there was no violation of s. 8.

III. Relevant Statutory Provisions

15 *Canadian Charter of Rights and Freedoms*

8. Everyone has the right to be secure against unreasonable search or seizure.

24. . . .

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Private Investigators and Security Guards Act, R.S.M. 1987, c. P132

1 In this Act

"security guard" means a person who, for hire or reward, guards or patrols for the purpose of protecting persons or property.

35 No person holding a licence under this Act shall hold himself out in any manner as performing or providing services or duties connected with the police.

IV. Issues

16 This appeal raises four issues:

(1) Whether the appellant had a reasonable expectation of privacy with respect to the locker;

(2) Whether the *Charter* applies to the security guards and if so, whether the original search of locker 135 was contrary to s. 8 of the *Charter*;

(3) Whether the subsequent warrantless search and seizure by the police was contrary to s. 8 of the *Charter*; and

(4) If there was an unreasonable search or seizure, whether the relevant evidence should be excluded under s. 24(2) of the *Charter*.

17 I have come to the conclusion that the trial judge correctly applied the law to the facts of the case at bar and that the Court of Appeal erred in finding that there was no search and seizure by the police. The appellant had a reasonable expectation of privacy in the contents of the locker he rented at the Winnipeg bus depot. The initial search by the security guards did not trigger the application of the *Charter* because the security guards were not acting as agents of the state. However, the police were required to obtain a warrant to search the appellant's locker. This warrantless search and seizure, not otherwise justified, violated the rights of the appellant under s. 8 of the *Charter*. I conclude that this Court should not interfere with the trial judge's decision to exclude the evidence under s. 24(2). The trial judge made no unreasonable findings of fact or legal error and I see no reason for intervening with his conclusion.

V. Analysis

A. *The Appellant's Expectation of Privacy With Respect to Locker 135*

18 Section 8 of the *Charter* protects the right to be secure against unreasonable search and seizure. To establish an infringement of s. 8, the person raising the claim must first establish that he or she had a reasonable expectation of privacy in the thing searched or seized (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 159; *Edwards*, at para. 30). Reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances (see, for example, *Edwards*, at para. 31, and *R. v. Wong*, [1990] 3 S.C.R. 36, at p. 62). The factors to be considered in assessing the totality of the circumstances include, but are not restricted to, the accused's presence at the time of the search, possession or control of the property or place searched, ownership of the property or place, historical use of the property or item, ability to regulate access, existence of a subjective expectation of privacy, and the objective reasonableness of the expectation (*Edwards*, at para. 45).

19 In this case, the question, "framed in broad and neutral terms" (*Wong*, *supra*, at p. 50), is whether in a society such as ours persons who store and lock belongings in a bus depot locker have a reasonable expectation of privacy.

20 In my opinion, the protections of s. 8 extend to the objects that a person stores and locks in a bus depot locker. I agree with Aquila Prov. Ct. J. that the appellant had a reasonable expectation of privacy in locker 135. As the trial judge put it, at para. 32:

> I am satisfied that Mr. Buhay had a personal and reasonable expectation of privacy in the content of the locker. He had a contractual obligation for a period of 24 hours for the exclusive use of that locker, which had not expired. Unless a dangerous substance was being stored, or a substance emitting obnoxious fumes was contained in the locker, neither the managers nor police had a right to enter. . . .

21 The appellant had control and possession of the locker's contents through possession of the key. Although he did not own the locker, and although it remained the property of the bus companies, the appellant did pay the required fee to rent the locker for his exclusive use for a particular period of time. Through the use of a key, the appellant had ability to regulate access to the locker for the rental period. Moreover, the signs on the lockers made no mention of the possibility that they might be opened and searched. The key holder would, in my view, have a subjective expectation of privacy and this expectation is objectively reasonable. Indeed, generally, the purpose for renting a locker in such a location is to secure one's belongings against theft, damage, or even the simple curiosity of others. A reasonable person would expect that his or her private belongings, when secured in a locker that he or she has paid money to rent, will be left alone, unless the contents appeared to pose a threat to the security of the bus depot. The same conclusion was reached in *R. v. Dinh* (2001), 42 C.R. (5th) 318, 2001 ABPC 48.

22 The respondent argues that the appellant had a low expectation of privacy because the bus companies owned the lockers and had a master key so they "could access the lockers at any time". True as this may be, it does not remove the reasonable expectation of privacy. A reasonable expectation of privacy is contextual. The expectation does not have to be of the highest form of privacy to trigger the protection of s. 8. For example, someone who rents a hotel room does not own the room, and very likely understands that hotel management has a master key. A reasonable understanding is that hotel staff will access the room, but for limited purposes. There is therefore a reasonable expectation of some privacy in the room, which can be enhanced by the display of a sign requesting privacy.

23 The issue was addressed by the Court of Appeal for Ontario in *R. v. Mercer* (1992), 70 C.C.C. (3d) 180, where the court held at p. 186: ". . . I am not persuaded that hotel guests' awareness that cleaning staff will enter their rooms at least daily removes the reasonable expectation of privacy" and further:

> Privacy would be inadequately protected if the reasonableness of a given expectation of

> privacy in one's office or hotel room could be displaced by an awareness of the possibility that cleaning staff may rummage through anything that is not locked away.

Although hotel rooms and bus lockers are not entirely analogous, I believe that the existence of a master key does not in itself destroy the expectation of privacy. If such were the case, there would be no expectation of privacy in an apartment building, office complex or university residence, for instance. Unless an emergency or other exigent circumstances arise, locker renters may reasonably expect that their lockers are free from unauthorized search by bus terminal security agents or by the police.

24 As recently stated in *R. v. Law*, [2002] 1 S.C.R. 227, 2002 SCC 10, this Court has adopted a liberal approach to the protection of privacy. Bastarache J. stressed at para. 16 that this protection extends not only to homes and personal items, but to information which we choose to keep confidential — particularly that which is kept under lock and key. The same applies to personal items which we choose to keep safe from the interference of others by storing and locking them in a space rented for that purpose. While it was not as high as the privacy afforded to one's own body, home, or office, a reasonable expectation of privacy existed in locker 135 sufficient to engage the appellant's s. 8 *Charter* rights. We must now turn to whether the initial search by the security guards constituted a violation of s. 8 of the *Charter*.

B. *Were the Security Guards State Agents During the Initial Search of Locker 135?*

25 Section 32 of the *Charter* provides that its provisions apply to the Parliament and government of Canada, and to the legislature and government of the provinces. Accordingly, the initial search of the appellant's locker by the security guards can only come under s. 8 scrutiny if the guards can be categorized either as "part of government" or as performing a specific government function (*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624), or if they can be considered state agents (*R. v. Broyles*, [1991] 3 S.C.R. 595; *M. (M.R.)*, *supra*). For this latter determination, it is important to focus on the relationship between the state (the police) and the private entity (the security guards). The test was enunciated in the context of police informers by Iacobucci J., writing for the Court, in *Broyles*, at p. 608:

> A relationship between the informer and the authorities which develops after the statement is made, or which in no way affects the exchange between the informer and the accused, will not make the informer a state agent for the purposes of the exchange in question. Only if the relationship between the informer and the state is such that the exchange between the informer and the accused is materially different from what it would have been had there been no such relationship should the informer be considered a state agent for the purposes of the exchange. I would accordingly adopt the following simple test: would the exchange between the accused and the informer have taken place, in the form and manner in which it

did take place, but for the intervention of the state or its agents?

26 In *M. (M.R.)*, *supra*, at para. 29, the Court applied that test in the context of a search of a student by a school official. Cory J., for the majority, held at para. 28 that "[t]he mere fact that there was cooperation between the vice-principal and the police and that an officer was present during the search is not sufficient to indicate that the vice-principal was acting as an agent of the police. . . . There is no evidence of an agreement or of police instructions to Mr. Cadue that could create an agency relationship."

27 In the present case, both the Court of Appeal and Aquila Prov. Ct. J. held that there was no *Charter* violation since the security guards were private actors and were not agents of the state. I agree.

28 Nothing in the evidence allows a conclusion that the security guards or the agency by which they were employed can be assimilated to the government itself, nor can their activities be ascribed to those of the government. Private security guards are neither government agents nor employees, and apart from a loose framework of statutory regulation, they are not subject to government control. Their work may overlap with the government's interest in preventing and investigating crime, but it cannot be said that the security guards were acting as delegates of the government carrying out its policies or programs. Even if one concedes that the protection of the public is a public purpose which is the responsibility of the state, this is not sufficient to qualify the functions of the security guards as governmental in nature. To this effect, this Court, in *Eldridge*, *supra*, held, at para. 43:

> . . . the mere fact that an entity performs what may loosely be termed a "public function", or the fact that a particular activity may be described as "public" in nature, will not be sufficient to bring it within the purview of "government" for the purposes of s. 32 of the *Charter*.
>
> . . .
>
> In order for the *Charter* to apply to a private entity, it must be found to be implementing a specific governmental policy or program. As I stated further on in *McKinney*, at p. 269, "[a] public purpose test is simply inadequate" and "is simply not the test mandated by s. 32". [Emphasis in original.]

29 The security guards cannot either be considered state agents. Based on the test set out in *Broyles*, *supra*, and *M. (M.R.)*, *supra*, the proper question is whether the security guards would have searched the contents of locker 135 but for the intervention of the police. On the facts here, it is clear that the security guards acted totally independently of the police in their initial search. In *M. (M.R.)*, the involvement of the police was even greater than in the case at bar, since the police had been contacted prior to the search and were present during the search. In the present case, the relationship between the police and the security guards developed after the security guards searched the appellant's locker. The guards started an investigation on their own initiative, without any instructions or directions from the police. While the incident report forms used by the security guards contain spaces for police incident numbers and badge numbers, I agree with the Crown that this only reflects a general policy of the security company to cooperate with the police. It is only normal, considering their functions, that security guards may be called upon to contact the police on a regular basis. That does not put them in a "standing" agency relationship with the police. This is confirmed by the *Private Investigators and Security Guards Act*, R.S.M. 1987, c. P132, which regulates the security guards' activities in Manitoba. Indeed, s. 35 expressly provides that security guards should not hold themselves out in any manner as performing or providing services or duties connected with the police.

30 Volunteer participation in the detection of crime by private actors, or general encouragements by the police authorities to citizens to participate in the detection of crime, will not usually be sufficient direction by the police to trigger the application of the *Charter*. Rather, the intervention of the police must be specific to the case being investigated (see, on the specific issue of whether security guards were acting as agents of the state: *Fitch*, *supra*; *R. v. Caucci* (1995), 43 C.R. (4th) 403 (Que. C.A.)). In the case at bar, there is nothing in the evidence which supports the view that the police instructed the security guards to search locker 135 and therefore the security guards cannot be considered state agents.

31 While there has been a growing use of private security in Canada and while private security officers arrest, detain and search individuals on a regular basis, "[t]he exclusion of private activity from the *Charter* was not a result of happenstance. It was a deliberate choice which must be respected" (*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 262). It may be that if the state were to abandon in whole or in part an essential public function to the private sector, even without an express delegation, the private activity could be assimilated to that of a state actor for *Charter* purposes. This is not the case here. As for whether private security guards are "agents of the state", the test in *Broyles*, *supra*, invites a case-by-case analysis which focusses on the actions which have given rise to the alleged *Charter* breach by the security guards and the relationship between them and the state. In any event, it should be noted that where no state actors are involved, other remedies than those under the *Charter* may be available for exclusion of the impugned evidence, as we will see below. In this case, the trial judge correctly focussed his analysis on the search conducted by the police, to which I now turn.

C. *Was the Search of Locker 135 by the Police Contrary to Section 8 of the Charter?*

32 We must now determine whether the search of the locker by the police was a reasonable search within the meaning of s. 8 (*Edwards*, *supra*, at para. 45). "A search will be reasonable if it is authorized by law, if the law itself is reasonable, and if the manner in which the search was carried out is reasonable": *Collins*, *supra*, at p. 278. The search of the locker was a warrantless search. Such searches are *prima facie* unreasonable, and the onus rests on the Crown to demonstrate on a balance of probabilities that the search was reasonable.

33 The Court of Appeal concluded, at para. 11, that the marijuana had been obtained by the police following a simple transfer of control from the security guards, which did not constitute a search and seizure by the police:

> It was only after the marihuana was discovered and under the control of the security guards that the police were called in. When the police attended, the locker was reopened and the marihuana taken into police custody. But the reality is that this was a mere transfer of control from the security guards to the police. Had the security guards placed the marihuana into a corner cupboard or into a different locker, there would be no question but that the transfer of the marihuana would not have constituted a search and seizure by the police. Placing the marihuana back into the same locker on a temporary basis, but still under the control of the security guards, leads to the same conclusion.

With respect, I disagree. The appellant initially had a reasonable expectation of privacy regarding the contents of his locker. His privacy was invaded by the security guards. The guards then placed his belongings back in the locker. The appellant's reasonable expectation of privacy was continuous. Just because the security guards violated his privacy once does not mean that any subsequent violations will be permissible. The conduct of the police — opening of a locked locker over which the appellant still had lawful control and taking possession of its contents — constituted a "search" within the meaning of s. 8 as well as a "seizure", the essence of which is the "taking of a thing from a person by a public authority without that person's consent": *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 431, *per* La Forest J.

34 This Court has held that in certain circumstances, the mere "transfer of control" of evidence from a private citizen to police can constitute a seizure within the meaning of s. 8. In *Dyment*, *supra*, La Forest J. said, at p. 435:

> If I were to draw the line between a seizure and a mere finding of evidence, I would draw it logically and purposefully at the point at which it can reasonably be said that the individual had ceased to have a privacy interest in the subject-matter allegedly seized.

In this case, it cannot reasonably be said that the appellant had ceased to have a privacy interest in the contents of his locker. The subsequent conduct of the police should be considered a seizure within the meaning of s. 8. I see no basis for holding that a person's reasonable expectation of privacy as to the contents of a rented and locked bus depot locker is destroyed merely because a private individual (such as a security guard) invades that privacy by investigating the contents of the locker. The intervention of the security guards does not relieve the police from the *Hunter* requirement of prior judicial authorization before seizing contraband uncovered by security guards. To conclude otherwise would amount to a "circumvention of the warrant requirement" (*Law*, *supra*, at para. 23). The security guards' search of the locker, which is not subject to the *Charter*, cannot exempt the police from the stringent prerequisites that come into play when the state wishes to intrude the appellant's privacy (*R. v. Colarusso*, [1994] 1 S.C.R. 20, at p. 64; *Law*, at para. 23).

35 I agree with the trial judge that the presumption that the warrantless search was unreasonable has not been rebutted by the Crown. There were no exigent circumstances, that is no immediate danger of the loss, removal, destruction, or disappearance of evidence if the search and seizure was delayed (*R. v. Grant*, [1993] 3 S.C.R. 223, at p. 243). The Crown cannot rely on any statutory or common law authority to show that the search was "authorized by law". Therefore, the requirements of *Collins* have not been satisfied.

36 The reasons for the police officers proceeding as they did are not relevant at this stage. Whether they believed that a warrant was not required, or would not likely be obtained, would not affect the legality of the search. These issues will be addressed in the s. 24(2) analysis (see *Mercer*, at p. 189). Evidently, the fact that there may not have been sufficient grounds to obtain a search warrant does not justify a warrantless search. Quite the opposite. It confirms that the invasion of privacy is not permissible. In such a case, "the avenues open to law enforcement authorities are to continue to investigate by methods less intrusive than a search and to seek to obtain a search warrant should the proper grounds upon which to do so materialize": *Mercer*, at p. 189; see also *R. v. Kokesch*, [1990] 3 S.C.R. 3, at p. 29.

37 The Crown also contends that the seizure was justified under the "plain view" doctrine, because the actions of the security guards put the contraband in plain view of the police. This argument must fail. It is not sufficient to argue that the evidence was in plain view at the time of the seizure. Indeed, it will nearly always be the case that police see the object when they seize it (see *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *R. v. Spindloe* (2001), 154 C.C.C. (3d) 8 (Sask. C.A.), at para. 36). It stretches the meaning of "plain view" to argue that an item placed in a duffel bag inside a locked locker is somehow in plain view of the police. The "plain view" doctrine requires, perhaps as a central feature, that the police officers have a prior justification for the intrusion into the place where the "plain view" seizure occurred (see, e.g., *Law*, *supra*, at para. 27; *Spindloe*, *supra*; *R. v. Belliveau* (1986), 75 N.B.R. (2d) 18 (C.A.); *R. v. Nielsen* (1988), 43 C.C.C. (3d) 548 (Sask. C.A.); *R. v. Kouyas* (1994), 136 N.S.R. (2d) 195 (C.A.), aff'd [1996] 1 S.C.R. 70; *R. v. Fitt* (1995), 96 C.C.C. (3d) 341 (N.S.C.A.), aff'd

[1996] 1 S.C.R. 70; *Texas v. Brown*, 460 U.S. 730 (1983), at p. 741; *Coolidge*, *supra*). The police did not come upon the marijuana during the course of a routine patrol or by the ordinary use of their senses. The police had no prior authorization to enter into the appellant's locker. While, in the circumstances of this case, they could lawfully enter the bus station, they could not lawfully enter the locker itself without a warrant. It follows the contraband was clearly not in plain view of the police so as to justify the legality of the seizure within the "plain view" doctrine.

38 The warrantless search and seizure of the items stored in the rented and locked bus depot locker was an impermissible intrusion of the state on a legitimate and reasonable expectation of privacy and, therefore, constitutes a violation of s. 8 of the *Charter*.

39 Before turning to s. 24(2), I wish to address briefly the approach taken by the Court of Appeal in this case. I will make two observations. First, we do not have to decide whether there would have been a "search" by the police had the security guards not replaced the contents inside the locker but had held it in a corner cupboard. This is not what they did here. Had they done so, we might have had to adapt the test in *Broyles*, *supra*, to determine if and when the security guards would have become state agents or, alternatively, if the "mere transfer of control" in that case could have been characterized as a "seizure" by the police within the meaning of s. 8.

40 Second, and more importantly, I wish to stress that even if the reasoning of the Court of Appeal were sound and that there had been no search and seizure triggering s. 8 of the *Charter*, remedies other than under the *Charter* might be available in such a case to an accused seeking exclusion of the impugned evidence. Indeed, even in the absence of a *Charter* breach, judges have a discretion at common law to exclude evidence obtained in circumstances such that it would result in unfairness if the evidence was admitted at trial, or if the prejudicial effect of admitting the evidence outweighs its probative value (see, in the context of confessions: *Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 696, *per* Lamer J., as he then was; *R. v. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38, at para. 69, *per* Iacobucci J.; see also J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at pp. 339-40); see also, in other contexts, *R. v. Harrer*, [1995] 3 S.C.R. 562, *per* La Forest J.; *Caucci*, *supra*, at paras. 13 and 17; Sopinka, Lederman and Bryant, *supra*, at pp. 30-33). Such an argument was not advanced in this case as the appellant maintained throughout that he was entitled to a *Charter* remedy for a s. 8 violation. In light of my conclusion on the s. 8 issue, it is not necessary to explore further whether this common law discretion could have extended to the exclusion of real evidence in circumstances such as here. Rather, we must turn to whether the marijuana illegally seized by the police should be excluded under s. 24(2) because its admission "would bring the administration of justice into disrepute".

D. *Should the Evidence be Excluded Under Section 24(2) of the Charter?*

41 Since this Court's landmark decision in *Collins*, *supra*, the various factors to be considered in making this determination have been organized under a three-step inquiry which has been generally adopted and applied in subsequent decisions of this Court. In the recent decision of *Law*, *supra*, the Court summarized at para. 33 the process for determining whether the admission of evidence would bring the administration of justice into disrepute:

> In *Collins*, *supra*, this Court grouped the circumstances to be considered under s. 24 (2) into three categories: (1) the effect of admitting the evidence on the fairness of the subsequent trial, (2) the seriousness of the police's conduct, and (3) the effects of excluding the evidence on the administration of justice. Trial judges are under an obligation to consider these three factors.

Prior to discussing these factors in the context of this case, it is appropriate to canvass the principles applicable to appellate review of a trial judge's decision to exclude or admit evidence following a breach of the *Charter*.

42 The trial judge's decision whether to exclude or not evidence under s. 24(2) of the *Charter* is, like any question of admissibility, a question of law from which an appeal will generally lie (*R. v. Therens*, [1985] 1 S.C.R. 613, at p. 653). In *Therens*, Le Dain J. clearly indicated, at p. 654, that "[u] nder the terms of s. 24(2), where a judge concludes that the admission of evidence would bring the administration of justice into disrepute, he or she has a duty, not a discretion, to exclude the evidence. This distinction is of some importance, of course, with reference to the scope of review of a determination under s. 24(2)." It does not follow however that there are no discretionary elements in a s. 24(2) analysis.

43 Indeed, in *Collins*, *supra*, while expressing agreement with Le Dain J. regarding the duty of the judge to admit or exclude evidence as a result of her or his findings, Lamer J. mentioned, at pp. 275-76, that where the trial judge's decision is based, for instance, on his assessment of the credibility of the witness, that assessment cannot be challenged by way of appeal. Later in his reasons, at p. 283, Lamer J. reminded trial judges that their "discretion [on whether admission of evidence would bring the administration of justice into disrepute] is grounded in community values" and that it would not be interfered with on appeal unless it is exercised in an unreasonable manner.

44 In light of the above, a distinction has been drawn between the judicial adjudication of disrepute, which involves an appreciation of evidence in the exercise of discretion, and the judicial decision to exclude, which is a duty flowing from a finding of disrepute (see Sopinka, Lederman and Bryant, *supra*, at p. 423). Deciding whether each of the preconditions to exclusion is met requires an evaluation of the evidence and the exercise of a substantial amount of judgment which mandates

deference by appellate courts (D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at p. 276; see also *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717, at p. 733). This Court has emphasized on numerous occasions the importance of deferring to the s. 24(2) *Charter* findings of lower court judges: see, e.g., *R. v. Duguay*, [1989] 1 S.C.R. 93, at p. 98; *Kokesch*, *supra*, at p. 19; *R. v. Greffe*, [1990] 1 S.C.R. 755, at p. 783; *R. v. Mellenthin*, [1992] 3 S.C.R. 615, at p. 625; *R. v. Wise*, [1992] 1 S.C.R. 527, at p. 539; *R. v. Goncalves*, [1993] 2 S.C.R. 3, at p. 3; *Grant*, *supra*, at p. 256; *R. v. Belnavis*, [1997] 3 S.C.R. 341, at para. 35; *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 68. It was recently recalled by this Court in *Law*, *supra*, at para. 32:

> While the decision to exclude must be a reasonable one, a reviewing court will not interfere with a trial judge's conclusions on s. 24(2) absent an "apparent error as to the applicable principles or rules of law" or an "unreasonable finding" . . . .

45 This is also consistent with the recent decision of this Court in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. The appreciation of whether the admission of evidence would bring the administration of justice into disrepute is a question of mixed fact and law as it involves the application of a legal standard to a set of facts. In *Housen*, at para. 37, Iacobucci and Major JJ., for the majority, held that "[t]his question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law".

46 On the s. 24(2) issue as on all others, the trial judge hears evidence and is thus better placed to weigh the credibility of witnesses and gauge the effect of their testimony. Iacobucci J., dissenting in part in *Belnavis*, *supra*, at para. 76, explained cogently the rationale for deference to the findings of trial judges:

> The reasons for this principle of deference are apparent and compelling. Trial judges hear witnesses directly. They observe their demeanour on the witness stand and hear the tone of their responses. They therefore acquire a great deal of information which is not necessarily evident from a written transcript, no matter how complete. Even if it were logistically possible for appellate courts to re-hear witnesses on a regular basis in order to get at this information, they would not do so; the sifting and weighing of this kind of evidence is the particular expertise of the trial court. The further up the appellate chain one goes, the more of this institutional expertise is lost and the greater the risk of a decision which does not reflect the realities of the situation.

47 The findings of the trial judge which are based on an appreciation of the testimony of witnesses will therefore be shown considerable deference. In s. 24(2) findings, this will be especially

true with respect to the assessment of the seriousness of the breach, which depends on factors generally established through testimony, such as good faith and the existence of a situation of necessity or urgency (*Law*, *supra*, at paras. 38-41).

48 As I explain in greater detail below, it is my view that the trial judge's conclusions were neither unreasonable nor based upon an error or a misapprehension of the applicable law. They are therefore entitled to deference from this Court. Even though my own appreciation of the s. 24(2) factors may have been different than that of the trial judge, I can find no basis to overrule his findings on this regard.

(1) Trial Fairness

49 Where the admission of the evidence would render a trial unfair, it could bring the administration of justice into disrepute to receive it and it must therefore be excluded. As Bastarache J. explained in *Law*, *supra*, at para. 34, citing *Collins*, *supra*, at p. 284, "[t]he concept of trial fairness is ultimately concerned with the continued effects of unfair self-incrimination on the accused; thus, the principal (though not exclusive) considerations at this stage will be the nature of the evidence obtained and the nature of the right violated". As Bastarache J. noted, the leading case on this issue is *Stillman*, *supra*, which held that the admission of "conscriptive" evidence, whether self-emanating or derivative, would generally affect the fairness of the trial. Evidence will be classified as conscriptive where "an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples": *Stillman*, at para. 80, *per* Cory J.

50 The evidence obtained in violation of the *Charter* which does not emanate from the accused but rather existed independently of the violation is classified as non-conscriptive evidence. Its admission will not affect adjudicative fairness, but the second and third sets of factors may militate towards its exclusion: *Stillman*, *supra*; *R. v. Evans*, [1996] 1 S.C.R. 8.

51 In the present case, Aquila Prov. Ct. J. was correct in concluding that admission of the marijuana seized following the search of locker 135 does not affect adjudicative fairness. The appellant has not been conscripted against himself in the creation of evidence and the evidence pre-existed the violation of the *Charter*. Furthermore, the evidence was clearly "discoverable" without any infringement of *Charter* rights. Thus, as the marijuana is non-conscriptive, "discoverable" evidence, its admission would not render the trial unfair. The admissibility of the marijuana therefore turns on a balancing of the factors relevant to the second and third questions — how serious was the breach, and would exclusion of the evidence discredit the justice system?

(2) Seriousness of the Breach

52 The second set of factors relates to the seriousness of the *Charter* violation. The seriousness of the police's conduct depends on "whether it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant" (*Therens*, *supra*, at p. 652). It is also relevant to consider whether the violation was motivated by a situation of urgency or necessity: *Therens*, at p. 652; *R. v. Silveira*, [1995] 2 S.C.R. 297, at p. 367; *Law*, *supra*, at para. 37. Also pertinent is whether the police officer could have obtained the evidence by other means, thus rendering her or his disregard for the *Charter* gratuitous and blatant: *Collins*, *supra*, at p. 285; *Law*, at para. 37. The court may also look at some or all of the following factors: the obtrusiveness of the search, the individual's expectation of privacy in the area searched and the existence of reasonable and probable grounds (*R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 34). As we have seen, the trial judge is entitled to considerable deference on this point: *Law*, at para. 38.

53 In this case, the trial judge concluded as follows, at para. 40:

> The violation was serious and was not simply a technical one. The court is concerned at the casual approach that the police took in infringing the accused's rights in these circumstances. It is this court's view and concern that if the evidence was to be admitted in this trial that it may encourage similar conduct by police in the future.

This conclusion comes after Aquila Prov. Ct. J. carefully reviewed the law on s. 24(2), including, citing *Silveira*, *supra*, the factors to be considered in determining the seriousness of a *Charter* breach.

54 The reasons given by Aquila Prov. Ct. J. to exclude the impugned evidence are admittedly somewhat brief. However, there is no suggestion here that the deficiencies in the scope of the reasons foreclose meaningful appellate review (*R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26). As pointed out by Binnie J. in *Sheppard*, at para. 26: "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself".

55 The fact that Aquila Prov. Ct. J. did not explicitly review all the evidence in his reasons does not persuade me that he failed to consider it as a whole in reaching his conclusion. After listing the three factors to be considered in applying s. 24(2) of the *Charter*, the trial judge clearly indicated on what basis he excluded the evidence. He directed himself correctly on the applicable law. A detailed examination of the record supports the reasonableness of his conclusions.

56 Aquila Prov. Ct. J. was particularly influenced by the fact that the police officers could have obtained a search warrant, but that they did not do so. Indeed, he quoted Lamer J. in *Collins*, *supra*, at p. 285: "In fact, their failure to proceed properly when that option was open to them tends to indicate a blatant disregard for the *Charter*, which is a factor supporting the exclusion of the evidence."

57 The good faith of the police is an important factor to consider in order to assess the seriousness of a violation of s. 8 of the *Charter*. Indeed, the central concern expressed by the trial judge was what he called the "casual approach" of the police towards the rights of the appellant. It is not clear from the record whether the police officers did not obtain a warrant because they wilfully disregarded the appellant's rights or because they (mistakenly) believed, in good faith, that the appellant did not have a reasonable expectation of privacy in the locker. Constable Barker testified under cross-examination that to obtain a warrant never crossed his mind:

> Q All right. Now, at that point in time, did you think about the search warrant?
>
> A No, we did not.
>
> Q The thought of a search warrant never crossed your mind; is that correct?
>
> A No. That's correct.
>
> Q All right. So you never discussed that with Sergeant Trakalo or anything like that?
>
> A No, I did not.
>
> . . .
>
> Q All right. Have you ever obtained a search warrant before –

A Yes, I have.

Q – in your course of business? Okay. So – and – and you know that as a general procedure, if – if you find a situation where there might be a receptacle, or a house or some location that is a private location, that contains contraband, what you do is you set up a guard over the location, or surveillance, and you go get a search warrant, and then you come back and you enter the premise or – or the receptacle, car, location, whatever it is you're getting the search warrant for; is that a correct procedure I'm referring to there?

A Yes, it is.

Q Okay. And again, no thought of that at this point in time?

A No. [Emphasis added.]

58 The other constable, Constable Riddell, mentioned that he did consider obtaining a warrant but that he did not think the appellant had a reasonable expectation of privacy in the locker and that, further, he did not think he had sufficient grounds to obtain a warrant:

Q Okay. And by the way, was there any thought about a search warrant up to that point in time? When you went over to that locker there, were you thinking about a search warrant at all?

A Thinking about it, yeah. It's always in the back of your mind, I guess, but –

Q Right. And the reason why you thought about it is because you – you go up there, and you see here's a locker, it's locked –

A Um-hum.

Q – it's something, obviously, that a citizen or maybe – (INAUDIBLE) a foreigner, even, but someone has paid to have privacy in that locker, right?

A Yeah. I guess my thinking was, sir, that being the bus depot's locker, that they had kind of given up the right to privacy in that case.

Q Okay. Well, that's – that's your thoughts. I understand.

A Yeah.

Q So the thought did cross your mind about a search warrant?

A Sure.

Q All right. But it didn't go any further than that, in the sense that you didn't discuss it with your partner?

A Not in detail. I guess basically the short of it was just basically what you and I have just discussed.

Q Right. So you – you decided at that point that whoever was using that locker didn't have sufficient right of privacy, in your mind, that would require a search warrant; that was your reason for not getting a search warrant?

A That, and there would be lack of grounds, even, to – maybe to get a search warrant at the time. [Emphasis added.]

59 It should first be noted that the officer's subjective belief that the appellant's rights were not affected does not make the violation less serious, unless his belief was reasonable (see, e.g., *Mercer*, *supra*, at p. 191). As Sopinka, Lederman and Bryant note, *supra*, at p. 450, "good faith cannot be claimed if a *Charter* violation is committed on the basis of a police officer's unreasonable error or ignorance as to the scope of his or her authority". Given that the locker had been rented for private use and was locked, and given the broad interpretation this Court has given to the right of privacy, I do not think the officer's perception that the right to privacy had been "given up" was altogether reasonable.

60 I share Aquila Prov. Ct. J.'s view that the fact that obtaining a warrant did not even cross the mind of one officer demonstrates a certain casual attitude toward the appellant's *Charter* rights. Moreover, the admission of Constable Riddell that he did consider obtaining a warrant but that he thought that he lacked sufficient grounds to get one also suggests blatant disregard for the appellant's rights. In *Kokesch*, *supra*, at p. 29, Sopinka J. stressed the significance of the admission by the police that they were aware they did not have reasonable and probable grounds sufficient to obtain a search warrant:

> Where the police have nothing but suspicion and no legal way to obtain other evidence, it follows that they must leave the suspect alone, not charge ahead and obtain evidence illegally and unconstitutionally. Where they take this latter course, the *Charter* violation is plainly more serious than it would be otherwise, not less. Any other conclusion leads to an indirect but substantial erosion of the *Hunter* standards. The Crown would happily concede s. 8 violations if they could routinely achieve admission under s. 24(2) with the claim that the police did not obtain a warrant because they did not have reasonable and probable grounds. The irony of this result is self-evident. [First emphasis added; second emphasis in original.]

61 In this case, the admission by Constable Riddell that he thought there were insufficient grounds to obtain a warrant can properly be viewed as fatal to a claim of good faith. This admission clearly reveals that the police officer made the choice to avoid the legal requirements of obtaining a warrant even on his own assumption that one might be required.

62 Moreover, there was no situation of urgency or necessity, as there was no immediate danger that the evidence would be lost, removed or destroyed, nor was an imminent threat posed by the marijuana in the locker. The situation did not require immediate action to secure the evidence, as the locking mechanism was still engaged and the 24-hour limit had not expired. It is also clear from the record that the police could have obtained the evidence without infringing the appellant's rights. The police could have secured the evidence by other means, by obtaining surveillance of the locker, for example. The officers' evidence indicated that they did not perform surveillance because there were not enough officers on duty that day, which was a Sunday. Under cross-examination, Constable Riddell testified as follows:

Q . . . For example, you didn't set up surveillance on the locker, to see who came to go inside of it, did you?

A No.

Q Any reason why you didn't do that?

A We weren't authorized to do so. We thought it was a good idea, but it just didn't happen that way.

Q When you say you weren't authorized to do so, what does that mean?

A Well, just lack of manpower.

63 The failure of the police officers to explore the other investigative techniques that were available to them shows the absence of sincere effort to comply with the *Charter* (see *R. v. Strachan*, [1988] 2 S.C.R. 980, at p. 1008, *per* Dickson C.J.; Sopinka, Lederman and Bryant, *supra*, at p. 455). As Lamer J. wrote in *Collins*, *supra*, at p. 285, "the availability of other investigatory techniques and the fact that the evidence could have been obtained without the violation of the *Charter* tend to render the *Charter* violation more serious". This principle was reiterated in *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 76, where Sopinka J. held that "[i]f other techniques were indeed available, it is demonstrative of bad faith and is particularly serious that the police chose to violate the appellant's rights". Similarly, in *Dyment*, *supra*, where there was no evidence that the respondent's rights were knowingly breached, but where there was no urgency and other investigative techniques were available, this Court made it clear, at p. 440, that "such lax police procedures cannot be condoned".

64 As indicated earlier, the police officers' casual attitude towards the warrant requirement appears to have been the determinative factor for the trial judge. The evidence supports this finding. The officers appear to have thought that getting a warrant was nothing more than a technical requirement that in this case may have been unnecessary or unavailable if, indeed, they thought about constitutional requirements at all.

65 Some other elements must be considered and some militate in favour of admission of the evidence. The search was not especially obtrusive and the appellant had a lesser expectation of privacy than there is in one's body, home or office. As Cory J. stressed in *Belnavis*, *supra*, at para. 40: "Obviously, the degree of the seriousness of the breach will increase the greater the expectation of privacy. Clearly the converse must also be true." Furthermore, regardless of Constable Riddell's belief that he did not have sufficient grounds to obtain a search warrant, objectively, he probably did. Indeed, the locker was emitting a smell of marijuana and the security guards, who had seen and handled what they identified as marijuana, were credible informants. The information that they conveyed to the police would have likely been sufficient for issuance of a warrant. This Court has repeatedly held that the existence of reasonable and probable grounds lessened the seriousness of the violation (see, e.g., *Caslake*, *supra*, at para. 34; *Belnavis*, *supra*, at para. 42; *R. v. Sieben*, [1987] 1 S.C.R. 295, at p. 299; *R. v. Jacoy*, [1988] 2 S.C.R. 548, at p. 560; and *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 60).

66 However, in balancing all of the relevant factors in the circumstances of this case, I cannot conclude that the conclusion of Aquila Prov. Ct. J. as to the seriousness of the violation is unreasonable. The evidence considered as a whole supports a conclusion that the violation was serious. The trial judge's assessment of the seriousness of the interference with the appellant's privacy interests reveals no misapprehension of the evidence, or failure to consider relevant factors, and is not unreasonable. His reasons reveal a full and clear understanding of the law. There is, in my view, no question that Aquila Prov. Ct. J. was in the best position to weigh the testimonies that led him to conclude that the police took a casual approach at infringing the appellant's rights.

(3) The Effect of Exclusion on the Reputation of the Administration of Justice

67 The third question from *Collins* is whether excluding the evidence would have a more serious impact on the repute of the administration of justice than admitting it. This factor is generally related to the seriousness of the offence and the importance of the evidence to the case for the Crown. In *Law*, *supra*, at para. 39, the Court summarized this inquiry as follows: "In general, this turns on whether the unconstitutionally obtained evidence forms a crucial part of the Crown's case and, where trial fairness is not affected, the seriousness of the underlying charge."

68 In this case, the conviction turned on the admissibility of the evidence. It was thus essential to the Crown's case. As for the seriousness of the offence, in *Kokesch*, *supra*, at p. 34, Sopinka J. said:

> The offences with which the appellant is charged are serious offences, though narcotics offences involving marijuana are generally regarded as less serious than those involving "hard" drugs such as cocaine and heroin.

These factors favour admitting the evidence. For the trial judge, however, they were outweighed by his concerns about the police officers' disregard for the appellant's *Charter* rights and the longer-term effects of the attitude they displayed in this case: "The court is concerned at the casual approach that the police took in infringing the accused's rights in these circumstances. It is this court's view and concern that if the evidence was to be admitted in this trial that it may encourage similar conduct by police in the future" (para. 40).

69 Again, although Aquila Prov. Ct. J. did not expand greatly on this particular branch of the *Collins* test, he did begin his reasons on s. 24(2) by listing the three factors to be considered in applying this section of the *Charter* and his conclusion shows that he did consider all of them, including the effect of exclusion on the repute of the administration of justice.

70 Lamer J. stressed at p. 281 in *Collins* that s. 24(2) is not a remedy for police misconduct. However, he also stressed that the purpose of s. 24(2) "is to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. This further disrepute will result from the admission of evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies" (first emphasis in original; second emphasis added). Iacobucci J. also recalled in *R. v. Burlingham*, [1995] 2 S.C.R. 206, at para. 25, that the purpose of the *Collins* test is "to oblige law enforcement authorities to respect the exigencies of the *Charter* . . .". The expressed concern of the trial judge that admitting the evidence in these circumstances may encourage similar police conduct in the future is in line with this purpose of the *Collins* test. More importantly, provincial court judges handle these kinds of issues on a daily basis. They have a much better understanding than we do about the likely effects of their decisions on their communities and on those who enforce the law in those communities. A concern such as the one expressed by Aquila Prov. Ct. J. should not, in my view, be dismissed lightly. The administration of justice does not have to be brought into disrepute on a national scale before courts may interfere to protect the integrity of the process within which they operate.

71 Admittedly, there are various precedents where non-conscriptive evidence such as drugs was admitted on the basis that exclusion would bring the administration of justice into further disrepute than admission would, especially where the evidence was essential to the Crown (see, e.g., *Mercer*, *supra*; *Kokesch*, *supra*; *Evans*, *supra*). Section 24(2) is not an automatic exclusionary rule (see, *inter alia*, *Dyment*, *supra*); in my view, neither should it become an automatic inclusionary rule when the evidence is non-conscriptive and essential to the Crown's case.

72 The question under s. 24(2) is whether the system's repute will be better served by the admission or the exclusion of the evidence, and it is thus necessary to consider any disrepute that may result from the exclusion of the evidence: *Collins*, *supra*, at pp. 285-86. At the end of the day, though,

the constitutional question is whether the admission of the evidence would bring the administration of justice into disrepute (*Collins*, at p. 281). An appellate court must determine if, all factors considered, the trial judge's conclusion to exclude the evidence, based on her or his finding that its admission would bring the administration of justice into disrepute, was reasonable.

73 The decision to exclude evidence always represents a balance between the interests of truth on one side and the integrity of the judicial system on the other: *R. v. Simmons*, [1988] 2 S.C.R. 495, at p. 534. This was well put by Doherty J.A. in a recent decision of the Court of Appeal for Ontario, *R. v. Kitaitchik* (2002), 161 O.A.C. 169, at para. 47: "The last stage of the *R. v. Collins*, *supra*, inquiry asks whether the vindication of the specific *Charter* violation through the exclusion of evidence extracts too great a toll on the truth seeking goal of the criminal trial." The trial judge concluded that the vindication of the *Charter* breach in this case, which was serious, did not extract too great a toll on the truth seeking goal of the criminal justice system. In light of his concern as to the long-term effect of the law enforcement officers' attitude in this case, it was well within Aquila Prov. Ct. J.'s judicial discretionary power to conclude that the admission of the marijuana in this case would cause greater disrepute to the justice system than its exclusion would, and such decision is very well within the limits of reasonableness.

VI. Conclusion

74 For these reasons, I would allow the appeal, set aside the judgment of the Court of Appeal, and restore the acquittal entered at trial.

Appeal allowed.

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